

(4)
No. 95-6

Supreme Court, U. S.
F I L E D

NOV 8 1995

CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NORFOLK & WESTERN RAILWAY COMPANY,
v. *Petitioner,*
WILLIAM J. HILES,
Respondent.

On Writ of Certiorari to the
Appellate Court of Illinois
Fifth Judicial District

**BRIEF OF ASSOCIATION OF AMERICAN RAILROADS
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

ROBERT W. BLANCHETTE *
Vice President-Law and
General Counsel
DANIEL SAPHIRE
General Attorney
ASSOCIATION OF AMERICAN
RAILROADS
American Railroads Building
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2505
Counsel for Amicus
* Counsel of Record

November 9, 1995

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS	1
STATEMENT OF THE CASE	4
ARGUMENT	4
I. THE RULING BELOW MISCONSTRUES THE PURPOSE OF THE SAFETY APPLIANCE ACT AND WOULD IMPOSE A TECHNOLOG- ICALLY IMPOSSIBLE BURDEN ON RAIL- ROADS	4
A. Congress Enacted The Safety Appliance Act To Ameliorate The Hazard Posed To Rail Employees From Going Between Cars Dur- ing The Coupling Operation	5
B. Drawbars Must Be Realigned From Time To Time And The Practice Cannot Be Outlawed..	9
CONCLUSION	13

TABLE OF AUTHORITIES

Cases	Page
<i>Affolder v. N.Y., C. & St. L. R. Co.</i> , 339 U.S. 96 (1950)	8
<i>Bailey v. Central Vermont Ry., Inc.</i> , 319 U.S. 350 (1943)	13
<i>Clark v. Kentucky & Indiana Terminal R.</i> , 728 F.2d 307 (6th Cir. 1984)	10
<i>Consolidated Rail Corp. v. Gottshall</i> , 114 S. Ct. 2396 (1994)	11
<i>Johnson v. Southern Pacific Co.</i> , 196 U.S. 1 (1904)	6, 7
<i>Kavorkian v. CSX Transp., Inc.</i> , 33 F.3d 570 (6th Cir. 1994)	8, 9, 10
<i>Lisek v. Norfolk & Western Ry. Co.</i> , 30 F.3d 823 (7th Cir. 1994), cert. denied, 115 S. Ct. 904 (1995)	9, 12
<i>O'Donnell v. Elgin, J. & E. R. Co.</i> , 338 U.S. 384 (1949)	3
<i>Reed v. Philadelphia, Bethlehem & New England R.</i> , 939 F.2d 128 (3rd Cir. 1991)	9
<i>Schneider v. National R. Passenger Corp.</i> , 987 F.2d 132 (2d Cir. 1993)	2
<i>United Transp. Union v. Lewis</i> , 711 F.2d 233 (D.C. Cir. 1983)	8, 9, 11
<i>Urie v. Thompson</i> , 337 U.S. 163 (1949)	3, 13
Statutes and Regulations	
27 Stat. 531	4
45 U.S.C. § 2	6
45 U.S.C. § 53	3
46 U.S.C. § 688	2
49 U.S.C. § 20302(a)	4, 6
49 U.S.C. § 20302(e)	4
49 C.F.R. § 215.125	5
Miscellaneous	
ASSOCIATION OF AMERICAN RAILROADS, CLAIM & LITIGATION REPORT	2
ASSOCIATION OF AMERICAN RAILROADS, MANUAL OF STANDARDS AND RECOMMENDED PRACTICES, Section B, Coupler and Freight Car Draft Components, M-211 (1994)	10

TABLE OF AUTHORITIES—Continued

	Page
ASSOCIATION OF AMERICAN RAILROADS, MANUAL OF STANDARDS AND RECOMMENDED PRACTICES, Section C-II, Specifications For Design, Fabrication and Construction of Freight Cars, M-1001, § 2.1.6 (1994)	9, 10
Baker, <i>Why Congress Should Repeal the Federal Employers' Liability Act of 1908</i> , 29 HARV. J. ON LEGIS. 79 (winter 1992)	13
CAR AND LOCOMOTIVE CYCLOPEDIA S8-1 (3rd ed. 1974)	10
GENERAL ACCOUNTING OFFICE, INTERCITY PASSENGER RAIL: FINANCIAL AND OPERATING CONDITIONS THREATEN AMTRAK'S LONG TERM VIABILITY (1995)	2
Letter from J.A. Angold to AAR Coupler and Draft Gear Committee members (Sept. 16, 1968)	11
Letter from W.A. Faris to C.L. Davidson (Dec. 23, 1968)	11
Report of the Proceedings of the Twenty-First Annual Convention of the Master Car-Builders' Association, June 14-16, 1887	3
U.S. CHAMBER OF COMMERCE, 1994 ANALYSIS OF WORKERS' COMPENSATION LAWS (1994)	2
24 Cong. Rec. 1275 (1893)	4, 6
24 Cong. Rec. 1280 (1893)	7
24 Cong. Rec. 1367 (1893)	8

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-6

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

WILLIAM J. HILES,
Respondent.

On Writ of Certiorari to the
Appellate Court of Illinois
Fifth Judicial District

**BRIEF OF ASSOCIATION OF AMERICAN RAILROADS
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

This brief of the Association of American Railroads is filed with the consent of the parties, the letters expressing consent having been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 76 per-

cent of the rail industry's line haul mileage and produce 94 percent of its freight revenues. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest.

One such matter is the Federal Employers' Liability Act (FELA). In 1908, before enactment of any no-fault workers' compensation statutes in the United States, Congress structured this tort-based remedy for railroad employees injured on the job. Subsequently, every state has enacted a workers' compensation law, under which concepts of negligence have been eliminated, leaving the railroad industry virtually the only one where work-related injuries are compensated under a fault-based system.¹

Each year thousands of claims and lawsuits are asserted under FELA against AAR members. In recent years, FELA costs have risen to over \$1 billion a year, far more than is spent by private industry in general in payment of compensation to injured employees.²

¹ Seamen are covered under FELA by virtue of 46 U.S.C. § 688. All other industries in the United States are covered by either state or federal no-fault workers' compensation systems. Unlike workers' compensation, which caps benefits, U.S. CHAMBER OF COMMERCE, 1994 ANALYSIS OF WORKERS' COMPENSATION LAWS 22-25, Chart VI (1994), FELA does not limit the amount of damages that may be collected when a railroad is liable. A FELA verdict will be deemed excessive only if it "shocks the judicial conscience." *Schneider v. National R. Passenger Corp.*, 987 F.2d 132, 137 (2d Cir. 1993). (\$1.75 million verdict, including over \$1 million in intangible damages, not excessive).

² For the past four years, the major railroads have spent between \$1.2 and 1.3 billion on FELA annually, or nearly 4 per cent of their gross revenues. ASSOCIATION OF AMERICAN RAILROADS, CLAIM & LITIGATION REPORT (Calendar years 1991, 1992, 1993, 1994) ("CLAIM & LITIGATION REPORT"). Private industry other than railroads pays about \$0.36 per employee hour worked under state workers' compensation, GENERAL ACCOUNTING OFFICE, INTERCITY PASSENGER RAIL: FINANCIAL AND OPERATING CONDITIONS THREATEN AMTRAK'S LONG-TERM VIABILITY 59 (1995), whereas railroads pay over \$2.00. 1994 CLAIM & LITIGATION REPORT, at 2-2.

AAR has a strong interest in this case because the ruling below would result in a further enlargement of the scope of FELA liability. This case concerns the interpretation of the Safety Appliance Act, an equipment statute; under FELA, violation of such a statute can constitute negligence *per se*. *Urie v. Thompson*, 337 U.S. 163, 189 (1949); *O'Donnell v. Elgin, J. & E. R. Co.*, 338 U.S. 384, 390 (1949).³

AAR has a long standing expertise in railroad operational issues, particularly the issue presented in the case at bar, the operation of couplers. For over one hundred years, AAR, or its predecessor organizations, have studied coupling operations, the means by which individual rail cars are linked to form a train. For example, the Master Car-Builders' Association (MCBA), an AAR predecessor organization, focussed on the issue as early as 1887. MCBA concluded then that "[r]ailroads have reached a point where there is an absolute need for an automatic train coupler; . . . The public demands it; safety of the trainmen demands it; and the economical operation of railroads demands it."⁴

The expertise of the American Railway Association (ARA), another AAR predecessor organization, was recognized by Congress when it enacted the Safety Appliance Act in 1893. That law directed ARA to designate to the Interstate Commerce Commission the standard height of drawbars on freight cars. Act of March 2,

³ Moreover, if such a statute is violated the railroad may not introduce evidence that the employee's negligence contributed to the injury, which ordinarily would serve to reduce any judgment in proportion to the contributory negligence. 45 U.S.C. § 53.

⁴ See, Report of the Proceedings of the Twenty-First Annual Convention of the Master Car-Builders' Association, June 14-16, 1887, 187, at 195 (Report of the Executive Committee on Automatic Freight Couplers). The Association was engaged in the evaluation and testing of various types of couplers in an effort to recommend a particular type for universal use.

1893, c. 196, § 5, 27 Stat. 531. Congress has continued to rely on the expertise of AAR in railroad operational issues.⁵

In addition to expanding railroad liability, the ruling below would make operational demands on railroads that, for technological reasons, cannot be met.

STATEMENT OF THE CASE

Amicus adopts the statement of the case in Petitioner's brief.

ARGUMENT

I. THE RULING BELOW MISCONSTRUES THE PURPOSE OF THE SAFETY APPLIANCE ACT AND WOULD IMPOSE A TECHNOLOGICALLY IMPOSSIBLE BURDEN ON RAILROADS

Section 2 of the Safety Appliance Act (SAA) was enacted to assure that coupling devices on rail cars will function on contract with each other (or the locomotive) so as to avoid the necessity for employees to go between moving cars to couple them manually.⁶ This process is called automatic coupling.

Today, all rail cars are equipped with automatic couplers. However, even couplers that are in perfect working order will from time to time become misaligned due

⁵ Recently Congress authorized the Secretary of Transportation to use AAR's services in carrying out his duties with regard to power and train brakes. 49 U.S.C. § 20302(e).

⁶ 24 Cong. Rec. 1275 (1893). *See infra* pp. 6-8. Now codified at 49 U.S.C. § 20302(a), in pertinent part this provision reads:

[A] railroad carrier may use or allow to be used on any of its railroad lines—

(1) a vehicle only if it is equipped with—

(A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles;

to the horizontal play of the drawbar required to permit the rounding of curves without derailment.⁷

The court below held that SAA holds a railroad is liable as a matter of law if an employee is injured while going between rail cars to align a drawbar for coupling. Since the court prohibited the railroad from introducing evidence that the coupler was not defective, the ruling essentially makes misalignment negligence *per se*.

The result is contrary to the intent of Congress in both SAA and FELA. Moreover, it ignores the realities of railroad operations and the state of rail technology. To uphold the court below would force railroads to abandon existing technology completely for an alternative that does not exist, and that certainly did not exist in 1893 when SAA was enacted. Congress never intended to present the industry with an operating impossibility.

A. Congress Enacted The Safety Appliance Act To Ameliorate The Hazard Posed To Rail Employees From Going Between Cars During The Coupling Operation

For this Court fully to appreciate the error below, some historical background is useful. Inherent in the concept of a train is that individual railroad cars can be assembled together (i.e., coupled) to travel a designated route. At the end of the route, the cars can be reassembled in different configurations for other destinations. In the United States, where origins and destinations spanned great distances and involved numerous rail companies, the growth and success of the technology required ease and uniform-

⁷ *See infra* notes 14-15 and accompanying text. Federal Railroad Administration regulations recognize that couplers must contain sufficient lateral play to prevent "fouling on curves." 49 C.F.R. Part 215.125. For the purposes of this brief, the terms "couplers," "drawbars" and "knuckles" are used by AAR as they are described in the Statement of the Case in Petitioner's Brief.

ity of such interchange. Obviously then, the efficiency of the coupling procedure has always been of critical importance.

As railroads built the nation's commercial network, there was a human toll. In the normal course of operations, rail employees were required to go between cars and perform coupling operations manually. This required standing between two cars as one moved toward the other. In the early days, several hundred employees were killed each year while coupling cars.⁸

During the last decade of the Nineteenth Century, Congress focused its attention on the perils of railroad work, and in particular the danger inherent in what was then the typical manner in which rail cars were connected. The high rate of death and injury resulting from this practice led Congress to enact section 2 of SAA, which, after a date certain, made it unlawful:

for any . . . common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of cars.⁹

By this act, Congress sought to change the existing practice to the extent it required employees to go between rail cars and attempt to couple them as one car moved toward the other. As the legislative history explains:

⁸ 24 Cong. Rec. 1275 (1893). The act of coupling alone accounted for about 15 per cent of all rail employee fatalities. *Id.*

⁹ This Court ruled that the statute should be read as though there were a comma after the word "uncoupled" so that the words "without the necessity of men going between the ends of cars" applies to the acts of both coupling and uncoupling. *Johnson v. Southern Pacific Co.*, 196 U.S. 1, 18-19 (1904). For many years found at 45 U.S.C. § 2, section 2 has been recodified at 45 U.S.C. § 20302(a). *Supra* note 6.

A railroad employee . . . is asked to step inside the track, stand up against a car which is not moving, and watch the coming of another car, which is being pushed steadily up against the car near which he stands.

24 Cong. Rec. 1280 (1893). This practice was necessitated because, at that time, many rail cars were not equipped with couplers that coupled automatically on impact. Moreover, even in the case of cars equipped with so-called automatic couplers, because of the lack of uniformity, coupling generally could not be accomplished without requiring an employee to go between the cars: automatic couplers that were not compatible still had to be coupled manually.

SAA, therefore, required that rail cars be equipped with automatic couplers, and that all couplers be sufficiently compatible so they would couple upon impact. *Johnson*, at 16-17.¹⁰ Technology was not an inhibiting factor.

Section 2 of SAA must be interpreted in the context of its original purpose. While it prohibits employees from going between cars to effect the actual coupling of cars, it does not prohibit other activities, including preparations that are necessary to permit cars to be coupled. The statute does not prohibit, nor was it intended to prohibit, employees from going in between cars to prepare knuckles or drawbars for coupling, operations that can and do take place while the cars are stationary. As the legislative history makes clear, these activities were not what concerned Congress:

. . . very few people have lost their lives by coupling inventions [sic] between cars when they are at a

¹⁰ The legislative history explained that "[t]he bill does not require any particular kind of coupler to be adopted by the railroads, except a coupler which can be coupled and uncoupled without requiring anybody to go between cars." 24 Cong. Rec. 1280 (1893). It was left to the railroads to reach consensus on what type of couplers to use to ensure compatibility.

standstill, but it is the continuous shifting and moving of cars in which the brakeman is expected to do the work under circumstances of great danger.

24 Cong. Rec. 1367.¹¹

This Court has previously recognized that SAA does not impose an absolute ban on employees going between cars, only a ban on employees going between cars to perform the act of coupling the cars. *Affolder v. N.Y., C. & St. L. R. Co.*, 339 U.S. 96 (1950).¹² The same conclusion was reached after a comprehensive and careful review of the legislative history of SAA by the Court of Appeals for the District of Columbia in *United Transp. Union v. Lewis*, 711 F.2d 233 (D.C. Cir. 1983), which found "that the scope of Section 2 is confined to the requirement that railroad cars be 'equipped' with automatic couplers that can be operated without the necessity of men going between the ends of the cars, and . . . that the statute does not separately prohibit the act of going between cars." *Id.* at 251.¹³ The *Lewis* court pointed out that

¹¹ Any suggestion that SAA was meant to bar any operation requiring employees to go between cars is further belied by the explicit recognition by Congress that the connection of air hoses (essential for braking), which might require employees to go between cars, would continue. 24 Cong. Rec. 1367.

The most recent decision by a federal court of appeals on this issue, *Kavorkian v. CSX Transp., Inc.*, 33 F.3d 570 (6th Cir. 1994), also recognized this important point: "Although workers must go between the cars to realign even non-defective drawbars, the danger in doing so does not come from the situation against which the FSAA seeks to safeguard (workers having to go between railroad cars moving together); the danger here is outside § 2's contemplated scope." 33 F.3d at 575.

¹² In *Affolder*, the Court ruled that if the coupler failed to couple because the knuckle had not been opened, there would be no violation of the act. 339 U.S. at 99.

¹³ The *Lewis* case did not involve a personal injury suit, but rather, a challenge by a rail union to a ruling by the Federal Railroad Administration that a procedure employed by a railroad that required employees partially to go between cars did not violate SAA.

SAA did not address operating procedures, and that if it was read as a blanket prohibition against going between cars during coupling operations, it would render it impossible to couple cars. *Id.* at 245. Since the *Lewis* decision, the other federal courts of appeals considering the issue have recognized that the purpose of SAA is to require that cars be equipped with automatic couplers in working order, not to prohibit employees from going between cars to perform activities other than coupling. See, *Kavorkian*; *Lisek v. Norfolk & Western Ry. Co.*, 30 F.3d 823 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 904 (1995); *Reed v. Philadelphia, Bethlehem & New England R.*, 939 F.2d 128 (3d Cir. 1991).

B. Drawbars Must Be Realigned From Time To Time And The Practice Cannot Be Outlawed

The decision below ignores a fundamental aspect of railroad operations. In order for rail cars to operate on curved track there must be some degree of play in the coupler unit.¹⁴ A rigid coupling mechanism would result in derailments. Thus, lateral play in drawbars is a fact of railroad life. A corollary fact is that coupler units, even in working order, may occasionally move out of line to the point where they will not couple on impact unless realigned.¹⁵

¹⁴ See, ASSOCIATION OF AMERICAN RAILROADS, MANUAL OF STANDARDS AND RECOMMENDED PRACTICES, Section C-II, Specifications For Design, Fabrication And Construction of Freight Cars, M-1001, § 2.1.6 (1994). ["MANUAL OF STANDARDS AND RECOMMENDED PRACTICES"]

¹⁵ Federal courts that have considered this matter have reached the same conclusion. *Lisek*, *supra* ("[I]t is uncontested for the purposes of this case that nondefective coupling mechanisms can, through the normal course of railyard operations, become misaligned to an extent that they will not couple without preliminary realignment." 30 F.3d at 831); *Kavorkian*, *supra* ("[A] drawbar frequently becomes misaligned by the normal jarring and vibrations of the railroad car or when the car is uncoupled on a different

The railroad industry is constantly alert to technological changes dealing with both interchangeability and the need to keep couplers in alignment. In furtherance of this goal, AAR has promulgated a set of mechanical rules for freight cars, known as the Interchange Rules. The specific mechanical standards referenced in the Rules are published by AAR in the "Manual of Standards and Recommended Practices."

Among other things, the Rules prescribe what types of couplers may be used to ensure interchangeability among cars.¹⁶ In addition, the amount of lateral play needed in drawbars so that rail cars of various sizes can safely round curves is specified.¹⁷ These specifications are derived from mathematical formulae relating to the length of cars and track curvature.

A satisfactory technology to address drawbar misalignment has yet to emerge. Efforts to develop technology that would cause couplers to realign automatically have been attempted. Self centering devices for couplers were introduced in the mid-1960's and were used for a time in

track, to such a degree that coupling can not occur without realignment." 33 F.3d at 575).

In *Clark v. Kentucky & Indiana Terminal R.*, 728 F.2d 307 (6th Cir. 1984), the Court opined, in dicta, that the lateral play needed to round curves would not cause a drawbar to become misaligned, and that a coupler in need of realignment in order to effect coupling was necessarily defective. This simply is not factually correct, and *Kavorkian*, acknowledging this point, rejected this aspect of the *Clark* ruling. 33 F.3d at 575.

¹⁶ MANUAL OF STANDARDS AND RECOMMENDED PRACTICES, Section B, Coupler and Freight Car Draft Components, M-211 (1994). In 1916, ARA adopted the Type D coupler as a standard. This was the first coupler in which parts provided by all manufacturers were completely interchangeable. In subsequent years, new designs were adopted by ARA, and later AAR. See, CAR AND LOCOMOTIVE CYCLOPEDIA S8-1 (3rd ed. 1974).

¹⁷ MANUAL OF STANDARDS AND RECOMMENDED PRACTICES, M-1001. *supra* note 14.

limited circumstances.¹⁸ AAR undertook extensive evaluation of these devices. These investigations revealed problems with the devices that were not addressed in a satisfactory manner.¹⁹ As a result, such devices eventually fell into disuse and are not used by railroads today.

Thus, the need for manually realigning drawbars that have moved off center is, and will continue to be, an integral part of railroad operations. SAA ought not be interpreted as converting a common and unavoidable practice into a violation of the law.²⁰

There is no conflict between SAA and the practical needs of railroad operations, and this Court should establish a rule that is consistent with both. Where an employee can show an injury caused by the failure of a coupler to couple automatically on impact, and no cause other than a defect or malfunction of the coupler can be attributed, there would be a violation of SAA, and liability would be established. However, where an injury occurs when an employee goes between a car to perform

¹⁸ The *Lewis* court noted this experimental use. 711 F.2d at 235 n. 5.

¹⁹ See e.g., Letter from J.A. Angold, Director Technical Research and Development, Atchison, Topeka & Santa Fe Railway Co. to AAR Coupler and Draft Gear Committee members (Sept. 16, 1968) (reporting that an investigation on his railroad revealed that 28 of 38 of a particular coupler centering device installed were found to be inoperative.); Letter from W.A. Faris, Asst. Manager Power and Equipment-Car to C.L. Davidson, Secretary, AAR Mechanical Division (Dec. 23, 1968) (reporting that an investigation on his railroad revealed that only 34.8% of the cars with a particular coupler centering device installed had operative devices.) (Letters are on file at the office of Amicus, 50 F Street, N.W., Washington, D.C. 20001.)

²⁰ To do so would render railroads insurers of their employees' safety in circumstances never contemplated by SAA or FELA. As this Court recently reaffirmed, "FELA does not make the employer the insurer of the safety of his employees while they are on duty. The basis for his liability is his negligence, not the fact that injuries occur." *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396, at 2404 (1994).

a task preparatory to coupling, or where the railroad can show that failure to couple was the result of a cause other than a defect in or malfunction of the equipment, SAA would not be violated. In this situation, the employee could still offer evidence that the injury resulted from the carrier's negligence; however, a ruling of negligence *per se* would be inappropriate.

Whether an unsuccessful attempt to couple had been made prior to an injury should not be determinative of whether SAA has been violated.²¹ Otherwise, two situations where a nondefective coupler becomes misaligned in the course of normal rail operations could lead to different results, solely based on an employee's initial estimation of whether a drawbar is properly aligned. For example, where an employee notices a misaligned drawbar, attempts to couple it and is injured, no SAA violation would occur, and negligence would need to be shown in order to recover. However, a different result would obtain where an employee does not notice the drawbar is misaligned, and attempts, unsuccessfully, to couple the cars. If the employee then attempted to align the drawbar now perceived to have been misaligned and is injured, a finding of an SAA violation, and negligence *per se*, would follow if a failed attempt to couple were determinative.

By ignoring clear intent of SAA, and the majority of federal court decisions, and finding SAA applicable in cases where there was no defect in or malfunction of the coupling device, the court below has expanded the notion of strict liability under FELA and shifted the balance in FELA prescribed by Congress.²² In expanding railroad liability, the court below improperly made a public policy decision. An argument can be made that

²¹ The *Lisek* court questioned whether a prior unsuccessful attempt at coupling would trigger liability. 30 F.3d at 831, n. 15.

²² While proof of negligence is a prerequisite for recovery under FELA, damages are uncapped. See *supra* note 1.

the rail industry should be treated like all others in that strict liability ought to obtain for workplace injuries.²³ However, this is an argument that must be made to the Congress.

CONCLUSION

On the basis of the foregoing, *amicus curiae* respectfully submits that the judgment of the Appellate Court of Illinois in this case be reversed.

Respectfully submitted,

ROBERT W. BLANCHETTE *
Vice President-Law and
General Counsel
DANIEL SAPHIRE
General Attorney
ASSOCIATION OF AMERICAN
RAILROADS
American Railroads Building
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2505
Counsel for Amicus
* Counsel of Record

November 9, 1995

²³ See, Baker, *Why Congress Should Repeal the Federal Employers' Liability Act of 1908*, 29 HARV. J. ON LEGIS. 79 (winter 1992). This Court has questioned the wisdom of FELA but has recognized that it is within Congress' province to make any change. See e.g., *Bailey v. Central Vermont Ry., Inc.*, 319 U.S. 350, 354 (1943); *Urie v. Thompson*, 337 U.S. at 196 (Frankfurter, J. concurring in part).